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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VAUGHN JACOBS,

Defendant and Appellant.

D041185

(Super. Ct. Nos. SCN133836,
CN136734, SCN141183)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

Vaughn Jacobs pled no contest to one count of attempted forcible lewd act upon a child and one count of attempted lewd act upon a child. (Pen. Code,¹ §§ 288, subd. (b)(1), 288, subd. (a), 664.) Jacobs also pled guilty to 20 felony counts of distributing matter depicting a person under the age of 18 in sexual conduct and 100 misdemeanor counts of possessing matter depicting a person under the age of 18 in sexual conduct.

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

(§§ 311.1, subd. (a), 311.11, subd. (a).) Jacobs also admitted a prior serious felony conviction (§ 667, subd. (a)(1)), and prior strike conviction under the Three Strikes law (§ 667, subd. (b)-(i)). The court sentenced Jacobs to a prison term of nine years and four months.

Jacobs contends the court abused its discretion by not striking the prior strike conviction and failing to stay the five-year enhancement resulting from the prior serious felony conviction finding. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Internet Sting

In August 2001 Detective Mickey Williams conducted an internet sting operation whereby he logged onto a San Diego gay chat room posing as "Mike," a 13-year-old boy. Jacobs sent "Mike" an instant message so that they could chat privately. After Jacobs stated he was 32 years old and Mike stated he was 13 years old, Jacobs asked "Mike" if he liked older guys. "Mike" answered affirmatively, and Jacobs responded that he liked younger guys. Thereafter Jacobs engaged "Mike" in a sexually explicit conversation, suggested they engage in sexual activity together, and agreed "Mike" should call him on the telephone. When "Mike" called him, Jacobs continued the sexually explicit conversation. The next day, the two engaged in another internet chat and agreed to meet at a library that day. Williams recruited a young looking officer to pose as "Mike" at the library. When Jacobs approached the officer at the library and asked if he was "Mike," Jacobs was arrested.

When the arresting officer asked Jacobs what vehicle he had driven in, Jacobs falsely stated he did not have a vehicle. In the trunk of the car Jacobs had driven to the library the police found a sports duffel bag containing various items, including nylon rope tied in a noose, two belts, a roll of duct tape, two neck ties, a jock strap, a straight razor, a safety razor, shaving gel, plastic tie wraps, lubricating liquid, shampoo, deodorant, a shoe horn, swim goggles, and a fitness club membership card. Jacobs told the police he had previously used the items in the bag during a sexual encounter with an 18-year-old male.

The police seized a large amount of child pornography from Jacobs's computer. The computer data also showed that Jacobs had e-mailed images of minors engaged in sexual conduct to other persons.

B. Current and Prior Conviction

After the preliminary hearing, Jacobs pled no contest or guilty to all the charges, including attempted forcible lewd act upon a child, attempted lewd act upon a child, and distribution and possession of child pornography. He admitted the prior serious felony conviction and prior strike conviction.

Jacobs's prior conviction, which occurred in 1984 when he was almost 24 years old, also involved child molestation. Jacobs forced a nine-year-old boy to manually masturbate him on several occasions. Expressing remorse and explaining that he had been molested as child, Jacobs pled guilty to a lewd act on a child (§ 288, subd. (a)). He was sentenced to 270 days in jail and placed on probation for five years. Jacobs remained arrest free until the instant offense.

C. Sentencing

The probation officer recommended a sentence of 20 years, four months. The prosecution urged the court to adopt the recommendation, pointing to the similarity between the instant and prior offenses and Jacobs's computer activities which reflected his sexual obsession with young boys, his interest in torture and bondage, and his ongoing sexual exploitation of children via trading of child pornography. The prosecution argued that the torture and bondage equipment in Jacobs's car showed a threat of great violence and cruelty; that Jacobs lied to the police about driving to the library in an attempt to hide the equipment in his car; and that Jacobs's offenses were increasing in severity because of the force associated with the instant attempted molestation.

Jacobs argued that a 20-year, four-month sentence was excessive and that it was appropriate to strike the prior strike conviction and impose an 18-month sentence. Jacobs pointed out that there was in fact no 13-year-old victim; there was no showing he had engaged in any molestation conduct for 17 years; he had been abused as a child; and he had strong support from family and friends and a successful career. Jacobs asserted he never thought "Mike" was 13 years old and that he confirmed his belief that "Mike" was an adult when he spoke to him on the phone and observed him at the library. He claimed that when he was speaking with "Mike" he was allowing "Mike" to act out a fantasy of being a teenager, a fantasy Jacobs had also engaged in on previous occasions. To support his claim, Jacobs presented the results of a polygraph test he passed which had examined the veracity of his claim that he believed "Mike" was an adult pretending to be a child.

Jacobs also pointed to his participation in extensive counseling after his arrest for the instant offense and presented psychological evaluations opining he is at a low to moderate risk level for recidivism and shows significant amenability and commitment to treatment. Friends and family members submitted numerous letters in support of Jacobs and attended the sentencing hearing.

Trial Court's Ruling

In making its sentencing choice and determining whether to strike the prior strike conviction, the trial court noted it had read the prosecution's statement in aggravation and Jacobs's statement in mitigation. The court stated that although Jacobs's conduct was reprehensible, he had some redeeming qualities as reflected in the strong show of support from his family and friends. The trial court ruled that regardless of Jacobs's statements that he did not intend to meet with a 13-year-old boy, its sentencing choice must be based on Jacobs's no contest plea to an offense involving this intent. Moreover, based on Jacobs's background and the matters on his computer, the court stated its assessment that Jacobs had "every hope . . . that it would be a 13-year-old boy"

The court found that Jacobs's current and prior offenses weighed against striking the prior strike because they were serious offenses; they involved a similar crime of molestation of a minor; and they are recidivist in nature. The court stated that the strongest factor which weighed in favor of striking the prior strike was that the prior offense had been committed over 17 years earlier. On balance, the court concluded that because of the nature of the prior and current offenses, it could not find that the defendant fell outside the mandates of the Three Strikes law.

The trial court rejected the 20-year, four-month sentence urged by the prosecution and recommended in the probation officer's report. The court chose the lower term of one year, six months (doubled to three years under the Three Strikes law) for count 2 (attempted lewd act) and stayed the sentence on count 1 (attempted forcible lewd act) pursuant to section 654.

As to the 20 felony counts of distribution of child pornography, the court imposed one-third the doubled middle term of four years (i.e., one year, four months) on one count of distribution of child pornography, made consecutive to the attempted child molestation sentence. Concurrent sentences were imposed on the remaining 19 counts of distribution and on the misdemeanor counts of possession of child pornography. Finally, the court imposed a consecutive five-year sentence enhancement for the prior serious felony conviction, resulting in a total sentence of nine years, four months.

DISCUSSION

I. *Prior Strike Conviction*

A trial court may strike a prior strike conviction finding for purposes of sentencing if, in light of the nature and circumstances of the defendant's current and prior felony convictions and the particulars of his background, character, and prospects, he is deemed outside the spirit of the Three Strikes law in whole or in part. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 161.) Jacobs contends that he falls outside the spirit of the Three Strikes law and that, accordingly, the trial court abused its discretion by not striking his prior strike conviction. He points to the fact that his prior conviction was committed 17 years earlier and he has since then led a crime free life. He asserts that the

court confined its analysis to the serious nature of his offense, and failed to consider the circumstances surrounding its commission; i.e., that his conduct was directed towards an adult and he knew "Mike" was an adult posing as a child. He argues the court also failed to consider his background, character, and prospects, including his traumatic childhood, his role as a husband and father, his successful career, his genuine remorse, his nonviolent record, his active involvement in and amenability to treatment, the low to middle risk of his recidivism as shown by the psychological testing, and the strong support of his family and friends.

The Three Strikes law does not offer a discretionary sentencing choice, but rather establishes a sentencing requirement that must be applied in every qualifying case unless the trial court concludes that an exception to the scheme should be made. (*People v. Strong* (2001) 87 Cal.App.4th 328, 337-338.) The purpose of the Three Strikes law is to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of a serious or violent felony. (*Id.* at p. 337.) When a trial court chooses to exercise its power to deviate from this otherwise mandatory sentencing scheme, it must articulate its reasons in an order entered on the minutes. (*People v. Williams, supra*, 17 Cal.4th at pp. 159, 161.)

In contrast, when a trial court *declines* to strike a prior strike conviction, it is sentencing in conformity with the sentencing norm and it need not state its reasons. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 433, 434; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 960.) When a trial court has applied the sentencing norm rather than created an exception to that norm, "all that is required on the appellate record is a

showing that the court was aware of its discretion to select an alternative disposition." (*People v. Gillispie, supra*, 60 Cal.App.4th at p. 434.) The court is presumed to have considered all relevant factors in the absence of an affirmative showing to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Thus, a trial court's statements focusing on only a few factors does not mean it did not consider other factors. (*Ibid.*)

To the extent Jacobs's argument is premised on the trial court's failure to expressly refer to certain relevant considerations when making its ruling, the argument is unavailing. Because the court's decision not to strike the prior strike followed rather than altered the sentencing norm, the trial court was not required to state its reasons. The record shows the court was provided with lengthy presentations, both oral and written, from the prosecution and the defense addressing the particular circumstances of Jacobs's current and prior offenses and his life situation. There is nothing in the record to indicate the court did not fully consider the factors encompassed in the defense presentation.

Turning to Jacobs's general claim that the trial court abused its discretion in deciding not to strike the prior strike, Jacobs must demonstrate that the court's decision was irrational or arbitrary. (*People v. Myers, supra*, 69 Cal.App.4th at pp. 309-310.) Even if reasonable people might disagree about whether to strike a prior conviction, the court's ruling must be affirmed if it is within the bounds of reason and supported by substantial evidence. (*Ibid.*; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998, 1002.)

The trial court's decision that this case did not warrant making an exception to sentencing under the Three Strikes law is reasonably supported by the indications in Jacobs's prior and current offenses, including his computer activity preceding his arrest,

that he has a proclivity towards sexual contact with minors (not just adult males), and that he chose to act on this proclivity when he arranged to meet with "Mike." Assuming arguendo that notwithstanding Jacobs's no contest plea the trial court could properly consider his claim that he knew "Mike" was not a minor when rendering its sentencing decision, the court was not required to credit this assertion. Given the sexually explicit content of Jacobs's statements to "Mike" during the internet chat before Jacobs spoke with "Mike" on the telephone, as well as Jacobs's possession and distribution of child pornography, the trial court's finding that Jacobs hoped "Mike" was a minor is fully supported by the record.

Moreover, the fact that there was a lengthy period of time between Jacobs's prior and current offense did not require the trial court to find he was not a recidivist offender. He committed a prior molestation, and attempted to commit another molestation. The trial court did not exceed the bounds of reason by concluding Jacobs was encompassed within the type of repeat offender who should be subject to greater punishment under the Three Strikes law. The reasonableness of the trial court's decision is further buttressed by the fact that the court did exercise leniency in its overall sentencing choice. The court rejected the lengthy sentence proposed by the prosecution and imposed a substantially shorter term.

II. Prior Serious Felony Enhancement

Jacobs requested that the trial court stay the five-year consecutive sentence enhancement required under section 667, subdivision (a)(1), for his prior serious felony conviction. The court denied the request, stating that it had no discretion to do so.

Citing *People v. Aubrey* (1998) 65 Cal.App.4th 279, Jacobs contends the court's belief it had no discretion to stay the enhancement was erroneous. In *Aubrey*, the trial court struck the defendant's prior strike conviction and enhanced the sentence based on the prior serious felony conviction. (*Id.* at pp. 281-282.) Because section 1385, subdivision (b), provides that a prior serious felony enhancement may not be stricken, the trial court believed it could not grant the defendant probation because probation would stay the enhancement. (*Id.* at pp. 282-283.) Distinguishing between the effect of striking as opposed to staying an enhancement *incident to a grant of probation*, the appellate court held that the trial court did retain discretion to grant probation to a defendant who is otherwise eligible for probation, even though probation results in a stay of the prior serious felony enhancement. (*Id.* at pp. 284-285.) The *Aubrey* court reasoned that striking an enhancement effectively dismisses it, whereas staying an enhancement pursuant to probation merely suspends the sentence and requires the sentence be served in the event probation is violated. (*Id.* at p. 284.)

Here, because the trial court did not strike the prior strike conviction, Jacobs was not eligible for probation. (§ 667, subd. (c)(2).) Accordingly, this case does not fall within the purview of *Aubrey*.

To the extent Jacobs is asserting that a defendant who is not eligible for probation may otherwise obtain a stay of a prior serious felony enhancement, we reject this argument. Because the Legislature has expressly provided that a prior serious felony enhancement may not be stricken (§ 1385, subd. (b)), it follows that a court may not seek to avoid the effect of the enhancement by means of a stay unless the stay is pursuant to a

grant of probation. (See *People v. Aubrey*, *supra*, 65 Cal.App.4th at p. 284; *People v. Superior Court (Roam)* 69 Cal.App.4th 1220, 1230; cf. *People v. Carrillo* (2001) 87 Cal.App.4th 1416, 1421; *People v. Santana* (1986) 182 Cal.App.3d 185, 190-192.) In the absence of a decision to strike the prior strike conviction so as to lift the bar on probation, the trial court's belief that it could not stay the prior serious felony enhancement was correct.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P.J.

BENKE, J.